Supreme Court, U.S.
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No.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

DARLENE JENKINS,

Petitioner,

v.

GEORGE W. HEINTZ and BOWMAN, HEINTZ, BOSCIA & McPHEE,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Must a plaintiff show that a defendant *intended* to violate the Fair Debt Collection Practices Act, 15 U.S.C. §1692 *et seq.*, in order to allege a violation of the Act?
2. Does the bona fide error defense of the FDCPA, 15 U.S.C. §1692k(c), eliminate debt collection attorneys' obligation to exercise legal judgment while collecting debts through litigation?
3. Can an error of legal judgment be a bona fide error for the purposes of the bona fide error defense of the FDCPA, 15 U.S.C. §1692k(c)?

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PREVIOUS OPINIONS

The citations of the official and unofficial reporters of the opinions and orders entered in this case, in chronological order, are as follows:

Defendants' motion to dismiss granted by the United States District Court for the Northern District of Illinois: unreported.

Decision of the United States District Court for the Northern District of Illinois reversed and remanded by the United States Court of Appeals for the Seventh Circuit: *Jenkins v. Heintz*, 25 F.3d 536 (7th Cir. 1994).

Certiorari granted by this Court: *Heintz v. Jenkins*, 513 U.S. 959, 115 S.Ct. 416, 130 L.Ed. 2d 332 (1994).

Decision of the United States Court of Appeals for the Seventh Circuit affirmed by this Court: *Heintz v. Jenkins*, 514 U.S. 291, 115 S.Ct. 1489, 131 L.Ed.2d 395 (1995).

Defendants' motion for summary judgment granted by the United States District Court for the Northern District of Illinois: unreported (App. 30-47).

Decision of the United States District Court for the Northern District of Illinois affirmed by the United States Court of Appeals for the Seventh Circuit: *Jenkins v. Heintz*, 124 F.3d 824 (7th Cir. 1997) (App. 1-29).

Petition for rehearing *en banc* denied by the United States Court of Appeals for the Seventh Circuit: unreported (App. 48-49).

STATEMENT OF JURISDICTION

The United States Court of Appeals for the Seventh Circuit upheld the decision of the United States District Court for the Northern District of Illinois granting summary judgment in favor of the respondents on August 26, 1997. The petitioner timely filed a petition for rehearing *en banc* on September 8, 1997, which was denied on October 23, 1997.

The petitioner now timely seeks a writ of certiorari. This Court has jurisdiction to review this case pursuant to 28 U.S.C. §1254(1).

STATUTES INVOLVED

15 U.S.C. §1692k, 15 U.S.C. §1692b(6), 15 U.S.C. §1692c(a)(1), 15 U.S.C. §1692c(a)(2), 15 U.S.C. §1692c (a)(3), 15 U.S.C. §1692d(5), 15 U.S.C. §1692e(8), 15 U.S.C. §1692f(1), 15 U.S.C. §1692j, 15 U.S.C. §1640(c), 15 U.S.C. §45. Relevant portions of statutory texts are reproduced in the Appendix (App. 50-54).

STATEMENT OF THE CASE

The facts below are set forth in Plaintiff's Second Amended Complaint, reprinted in the Appendix (App. 55-65); Defendants' Motion for Summary Judgment; Plaintiff's Response to Defendants' Motion for Summary Judgment; and Plaintiff's Response to Defendants' Statement of Undisputed Fact.

In July 1987, Darlene Jenkins signed a retail installment sales contract for the purchase of a motor vehicle. The contract was assigned to Gainer Bank, now known

as NBD Bank. The contract provides that the borrower must keep the vehicle "fully insured against loss or damage," and that if the borrower fails to do so, the lender may purchase such insurance and add the premium to the borrower's loan balance.

After Ms. Jenkins had made 35 out of 48 payments due, the car was repossessed by NBD. Respondents were retained to collect a purported deficiency balance by filing suit against Ms. Jenkins in the Circuit Court of Cook County, Illinois. A substantial portion of the amount claimed to be due consisted of premiums for "force placed insurance."

This force placed insurance included "financial protection insurance" issued by Balboa Insurance Company. NBD charged the premiums for this coverage to Ms. Jenkins and to other consumers who had contracts identical to Ms. Jenkins' contract. This force placed insurance covered much more than loss or damage to the collateral—it also protected NBD against various types of defaults by the customer (such as expenses incurred in repossessing a car from a consumer upon default, mechanic's liens, and errors in perfecting security interests). Further, it indemnified NBD against liability under federal law as a result of a breach of warranty by a car dealer or manufacturer (the "holder in due course endorsement"). Finally, 30% of the "premium" was *retained* (presumably by NBD) as a "commission."

Nothing in Ms. Jenkins' motor vehicle retail installment contract allowed the bank to procure this additional insurance and charge it to the account of the consumer. The premiums charged to each class member total $2,000 to $4,000, plus interest charged on the premiums added to the consumer's loan balance.

Shortly after the state court action was filed, respondent Heintz sent a letter in an attempt to settle (*i.e.*, to collect the debt, which he knew consisted primarily of the force placed insurance premium). In that letter, respondents demanded payment of $4,173 in insurance premiums that had been added to the $3,000 principal at the time of repossession. The force placed insurance premiums greatly exceeded the value of the vehicle at the time of repossession (the vehicle sold at auction for $725). By the time the bank was finished adding insurance, the "balance in effect at the time of repossession" was approximately $8,500 on an original amount financed of $8,520.94 after Ms. Jenkins had paid approximately $8,285 (35 payments of $236.71).

Ms. Jenkins filed this action on behalf of a class in the United States District Court for the Northern District of Illinois to obtain relief for respondents' violation of the FDCPA. She alleged that respondents violated 15 U.S.C. §1692 by attempting to collect and collecting amounts charged for force placed insurance premiums that were not authorized by law or contract. The District Court exercised jurisdiction under 28 U.S.C. §1331 and 15 U.S.C. §1692k.

Respondents filed a motion to dismiss, which the District Court granted on July 27, 1993, holding that the FDCPA did not apply to attorneys engaged in litigation. Ms. Jenkins appealed to the Seventh Circuit, which reversed the dismissal on May 27, 1994. Respondents appealed to this Court, which granted certiorari and affirmed the Seventh Circuit's opinion on April 18, 1995, holding that the FDCPA applies to the debt collection activities of attorneys engaged in litigation. The case was

then remanded to the District Court for further proceedings.

Respondents next filed a motion for summary judgment, contending that they had no information or knowledge about the nature of the insurance coverage obtained by the bank. Respondents asserted that they were retained only to collect amounts claimed due and that none of their attorneys, agents or employees "acted in the capacity of corporate counsel" to the bank or had any "information" or "discussions" with the bank concerning the nature or extent of the coverages obtained by the bank pursuant to its loan contracts.

After a protracted discovery battle, Ms. Jenkins responded with numerous pieces of evidence showing that respondents did in fact possess a great deal of information about the possible illegality of the force placed insurance premiums. She provided evidence showing that respondents held discussions with NBD concerning the legality of the force placed insurance premiums. She also provided evidence showing that respondents rendered legal opinions to NBD concerning force placed insurance. Nonetheless, on September 17, 1996, the District Court granted summary judgment in favor of the respondents.

Ms. Jenkins timely appealed again to the Seventh Circuit, which affirmed the decision of the District Court on August 26, 1997, holding that (1) intent is an element of an FDCPA violation; (2) the bona fide error defense of the FDCPA, 15 U.S.C. §1692k(c), eliminates the obligation of debt collection attorneys to exercise legal judgment while collecting debts through litigation; and (3) an error of legal judgment can be a bona fide error for the purposes of the bona fide error defense of the FDCPA, 15 U.S.C. §1692k(c).

Ms. Jenkins timely filed a petition for rehearing *en banc* in the Seventh Circuit on September 8, 1997, which was denied on October 23, 1997. She timely seeks a writ of certiorari to resolve these important questions surrounding the coverage of the FDCPA and to resolve conflicts among the circuits:

- On the first question presented for review, the Seventh Circuit decision directly conflicts with decisions of the Second Circuit and the Fifth Circuit. *Russell v. Equifax A.R.S.*, 74 F.3d 30 (2d Cir. 1996); *Bentley v. Great Lakes Collection Bureau, Inc.*, 6 F.3d 60 (2d Cir. 1993); *Taylor v. Perrin, Landry, deLaunday & Durand*, 103 F.3d 1232 (5th Cir. 1997).
- On the second question presented for review, the Seventh Circuit decision directly conflicts with the decision of this Court in *Heintz v. Jenkins*, 514 U.S. 291, 115 S.Ct. 1489, 131 L.Ed.2d 395 (1995), and with decisions of the Second Circuit, the Eighth Circuit, the Ninth Circuit, and a previous decision of the Seventh Circuit. *Pipiles v. Credit Bureau of Lockport, Inc.*, 886 F.2d 22 (2d Cir. 1989); *Hulshizer v. Global Credit Services, Inc.*, 728 F.2d 1037 (8th Cir. 1984); *Baker v. G.C. Services Corp.*, 677 F.2d 775 (9th Cir. 1982); *Avila v. Rubin*, 84 F.3d 222 (7th Cir. 1996).
- On the third question presented for review, the Seventh Circuit decision directly conflicts with decisions of the Second Circuit, the Eighth Circuit, and the Ninth Circuit. *Pipiles, supra*; *Hulshizer, supra*; *Baker, supra*.

ARGUMENT

I.

THE IMPOSITION OF AN INTENT REQUIREMENT ON AN FDCPA CLAIM DIRECTLY CONTRADICTS THE PLAIN LANGUAGE OF THE FDCPA AND THE DECISIONS OF OTHER CIRCUITS.

In its decision of August 26, 1997, a majority of a panel of the Seventh Circuit (Circuit Judges Manion and Kanne; Ripple, J. dissenting) held that intent is required for liability under the FDCPA. This holding creates a conflict with the Second and Fifth Circuits—indeed, every other court to have considered the matter has held that the FDCPA is a strict liability statute. *Russell v. Equifax A.R.S.*, 74 F.3d 30, 33 (2d Cir. 1996); *Bentley v. Great Lakes Collection Bureau, Inc.*, 6 F.3d 60, 63 (2d Cir. 1993); *Taylor v. Perrin, Landry, deLaunday & Durand*, 103 F.3d 1232, 1238 (5th Cir. 1997).[1] Except in the Seventh Circuit, FDCPA plaintiffs need prove neither intent nor negligence.

The Seventh Circuit has therefore imposed an unprecedented requirement that FDCPA plaintiffs show that

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[1] *Accord, Mateer v. Ross, Suchoff, Egert, Hankin, Maidenbaum & Mazel*, 1997 U.S. Dist. LEXIS 4517 (S.D.N.Y. April 10, 1997); *O'Connor v. Check Rite, Ltd.*, 973 F.Supp. 1010 (D.Colo. 1997); *Baez-Martinez v. PMS*, 1997 U.S. Dist. LEXIS 3314 (D.P.R. Feb. 6, 1997); *Stewart v. Slaughter*, 165 F.R.D. 696 (M.D.Ga. 1996); *Russey v. Rankin*, 911 F.Supp. 1449 (D.N.M. 1995); *Kuhn v. Account Control Technology*, 865 F.Supp. 1443 (D.Nev. 1994); *Belile v. Allied Medical Accounts Control Associated Bureaus (In re Belile)*, 209 B.R. 658 (Bankr.E.D.Pa. 1997); *Bingham v. Collection Bureau, Inc.*, 505 F.Supp. 864 (D.N.D. 1981); *Crawford v. Credit Collection Services*, 898 F.Supp. 699 (D.S.D. 1995); *Newman v. Checkrite Cal*, 912 F.Supp. 1354 (E.D.Cal. 1995).

debt collectors acted with intent to violate the Act. In so doing, the Seventh Circuit creates a serious conflict with other circuits and with the text of the FDCPA itself and severely weakens the protection that Congress intended the FDCPA to provide. The Seventh Circuit stated:

> Section 1692k of the Act provides for civil liability against a debt collector who *intentionally violates the Act*; such a collector is absolved if the violation was unintentional and procedures were in place to prevent it.

Jenkins, 124 F.3d at 828 (emphasis added).

In fact, the plain language of the FDCPA provides that civil liability exists for *any* debt collector who violates the FDCPA, regardless of intent. 15 U.S.C. §1692k. Intent is properly considered only with respect to the amount of statutory damages after liability is determined. 15 U.S.C. §1692k(b).

The Seventh Circuit conflated the presence of the bona fide error defense, codified at 15 U.S.C. §1692k(c), with a general requirement that an FDCPA plaintiff show intent. Such a requirement is not present in the FDCPA and stands in direct conflict with numerous other decisions.

The Seventh Circuit stated:

> If the FDCPA assigned liability for negligent behavior, Jenkins' case might survive. But far too many assumptions must be made before it would be reasonable to infer defendants actually knew, and then intentionally made a false representation as to the character of Jenkins' debt, as 15 U.S.C. §1692 requires. *Jenkins has failed to point to a genuine issue of material fact that defendants intentionally violated the FDCPA.*

Id. at 831 (emphasis added). The Seventh Circuit has distorted Ms. Jenkins' burden, and, in so doing, has subscribed to an unprecedented view of the FDCPA—one that neither Congress nor any other circuit has adopted.

When drafting the FDCPA, Congress chose *not* to impose an intent requirement that covered the entire Act. Instead, Congress applied individual intent or knowledge requirements to specific provisions of the FDCPA:

- 15 U.S.C. §§1692b(6) and 1692c(a)(2) provide that when a collector knows the consumer is represented by an attorney, the collector is prohibited from communicating with anyone other than the attorney.
- 15 U.S.C. §1692c(a)(1) prohibits a collector from communicating with a consumer at a time or place "known or which should be known to be inconvenient to the consumer."
- 15 U.S.C. §1692c(a)(3) prohibits communications with a consumer's place of employment if the collector "knows or has reason to know that the consumer's employer prohibits the consumer from receiving such communication."
- 15 U.S.C. §1692d(5) prohibits debt collectors from making repeated telephone calls to a debtor "with the intent to annoy."
- 15 U.S.C. §1692e(8) prohibits "[c]ommunicating or threatening to communicate to any person credit information which is known or which should be known to be false, including the failure to communicate that a disputed debt is disputed."

- 15 U.S.C. §1692j provides that those who "design, compile or furnish any form knowing that such form would be used to create the false belief in a consumer that a person other than the creditor of such consumer is participating in the collection of . . . a debt" are liable under the FDCPA.
- 15 U.S.C. §1692k(b) provides that in "determining the amount of liability . . . the court shall consider . . . the extent to which such noncompliance was intentional . . . ."

These specific provisions show that Congress chose to impose separate and specific knowledge and intent requirements on individual provisions of the FDCPA, rather than imposing the sort of comprehensive intent provision that the Seventh Circuit posits. As this Court emphasized in this very case, the plain meaning of a statute prevails. *Heintz*, 514 U.S. at 297-298.

Contrary to the Seventh Circuit's interpretation, a mere lack of intent to violate the FDCPA has never been sufficient to avoid liability. *Russell*, 74 F.3d at 33. The bona fide error defense, 15 U.S.C. §1692k(c), is a two-part defense that debt collectors may invoke *if* "the debt collector shows by a preponderance of the evidence that the violation was not intentional *and* resulted from a bona fide error notwithstanding the maintenance of such procedures reasonably adapted to avoid any such error" (emphasis added). The defense contains two parts, both of which a debt collector must show to avoid liability. *Mere lack of intent*, alone, is not enough, because the FDCPA is a strict liability statute. A debt collector lacking intent is nonetheless liable unless he or she can establish the second part of the defense.

Indeed, the "intentional" prong of §1692k(c) necessarily excludes intent as a general requirement of liability; otherwise, the provision would be superfluous. Furthermore, requiring "reasonable procedures" necessarily implies that *unintentional* acts give rise to liability. What is a "reasonable procedure" to avoid one's own *intentional* acts? Under the court's reading, §1692k(c) is nonsensical—only intentional acts give rise to liability, but there is a defense based on lack of intent.

The FDCPA was patterned after §5 of the Federal Trade Commission Act, 15 U.S.C. §45. *Clomon v. Jackson*, 988 F.2d 1314, 1318 (2d Cir. 1993). Under the FTC Act, there is no requirement of intent or negligence. *FTC v. Sterling Drug, Inc.*, 317 F.2d 669, 674 (2d Cir. 1963); *Gimbel Bros., Inc. v. Federal Trade Com.*, 116 F.2d 578, 579 (2d Cir. 1941); *Helbros Watch Co. v. Federal Trade Com.*, 310 F.2d 868, 870 (D.C.Cir. 1962).

The Seventh Circuit's unprecedented dilution of the protection from unscrupulous debt collectors currently provided by the FDCPA is based on an incorrect interpretation of the Act.

II.

INTERPRETING THE BONA FIDE ERROR DEFENSE TO ELIMINATE DEBT COLLECTION ATTORNEYS' OBLIGATION TO EXERCISE LEGAL JUDGMENT CONFLICTS WITH CONGRESSIONAL INTENT, THE PRIOR DECISION OF THIS COURT, AND DECISIONS OF THE CIRCUIT COURTS.

The Seventh Circuit also held that the bona fide error provision of the FDCPA does not require collection attorneys to exercise legal judgment while collecting debts through litigation. This holding is inconsistent with

Congressional intent, this Court's decision in *Heintz*, *supra*, and previous decisions of the circuit courts, including the Seventh Circuit. *Pipiles v. Credit Bureau of Lockport, Inc.*, 886 F.2d 22 (2d Cir. 1989); *Hulshizer v. Global Credit Services, Inc.*, 728 F.2d 1037 (8th Cir. 1984); *Baker v. G.C. Services Corp.*, 677 F.2d 775 (9th Cir. 1982); *Avila v. Rubin*, 84 F.3d 222 (7th Cir. 1996).

The Seventh Circuit's decision effectively grants collection attorneys much of the immunity under the FDCPA that they enjoyed *before* Congress repealed the attorney exemption in 1986. The court's holding permits attorneys who collect debts to capitalize on the power of their influence and authority as attorneys to collect money while allowing them to skirt liability for violations of the FDCPA by hiding behind the unverified claims of creditors.

Congress repealed the attorney exemption in the first place because Congress found that "bar associations have failed to fulfill their obligations underlying the premise of the attorney exemption." 99th Cong. 2nd Sess. (1985), *reprinted in* 1986 U.S.C.C.A.N. 1752, 1757. Congressman Annunzio stated on the floor of Congress:

> The staggering increase in recent years in installment and other credit sales has had a profound effect on that segment of the bar involved in collection work. The demand of volume threatens to destroy all vestiges of professionalism. The problem is too extensive to be remedied on a case-by-case basis.

131 Cong. Rec. H10535.

Under the Seventh Circuit's decision, attorneys are again free to use their status and power as attorneys for

the benefit of creditors without assuming the responsibilities that Congress sought to impose upon them when it repealed the attorney exemption and that this Court solidified in *Heintz*, *supra*. The Seventh Circuit accomplishes this remarkable change by construing the bona fide error defense, 15 U.S.C. §1692k(c), so broadly that it becomes all-encompassing. The Seventh Circuit holds that attorneys, who have at their disposal the tool of litigation, need not exercise legal judgment *when collecting debts during litigation.* The Seventh Circuit noted:

> [E]rrors in legal judgment are not an issue simply because the collectors are attorneys; nevertheless, there is no evidence that defendants exercised any legal judgment as to the validity of the force placed insurance charges.

Jenkins, 124 F.3d at 832.

Every other circuit to consider the issue has held that no debt collector is protected from mistakes of law by the bona fide error defense. *Pipiles, supra*; *Hulshizer, supra; Baker, supra*. Because even non-attorney debt collectors must be clear about the law before they contact consumers, it is indeed a strange result that the Seventh Circuit has decided to allow attorneys to blindly ignore the law as it relates to the underlying debt.

The Seventh Circuit gives attorneys who collect debts during litigation the right to refuse to use their capacity for legal judgment concerning the validity of the debt. Under the Seventh Circuit's decision, a creditor could add any sort of unauthorized amount to a debt, which the debt collecting attorney could then seek to collect without any inquiry. Such debt "padding" is a common debt collection abuse, and under the Seventh Circuit's decision, attorneys will once again be able to collect

padded debts with complete impunity, as long as they take pains to remain ignorant of the details.

Examples of debt padding abound. In *Strange v. Wexler*, 796 F.Supp. 1117 (N.D.Ill. 1992), an attorney debt collector added $300 in unauthorized attorney's fees to a debt. The court determined that Wexler was a debt collector, and it granted summary judgment for the plaintiff, holding that Wexler attempted to collect an amount that was not owed, notwithstanding Wexler's attempt to rely on a good-faith mistake defense. The court noted that "Wexler may have believed it was not in his interest to examine his cases carefully to determine whether he was entitled to attorney's fees from the debtor." *Id.* at 1120. Now, under the Seventh Circuit's decision, ignorance is bliss—if the attorney does not examine the contract and exercise "legal judgment" to determine that fees are not recoverable if the contract does not provide for them, then he or she has no liability.

Such a result also directly conflicts with the Seventh Circuit's holding in *Avila*, *supra*, in which the court discussed at length the responsibilities of attorneys who collect debts:

> An unsophisticated consumer, getting a letter from an "attorney," knows the price of poker has just gone up . . . . A letter from an attorney implies that a real lawyer, acting like a lawyer usually acts, directly controlled or supervised the process through which the letter was sent. That's the essence of the connotation that accompanies the title of "attorney" . . . . It is reasonable to believe that a dunning letter from an attorney threatening legal action will be more effective in collecting a debt than a letter from a collection agency. *The attorney letter implies that the at-*

> *torney has reached a considered, professional judgment that the debtor is delinquent and is a candidate for legal action.*

Id. at 229 (emphasis added). The Seventh Circuit went on to note that attorneys, who have been given special privileges by the state that *only attorneys can exercise*, should be held to a *higher standard than non-attorney debt collectors* when allowing dunning letters to be sent in their names. *Id.*

The Seventh Circuit has thus created two levels of culpability. Attorneys engaged in litigation are held to the strict standards of responsibility that correspond with their power and authority as custodians of the law. But attorneys who are engaged in litigation and are *also collecting debts* are *not* required to exercise legal judgment as to the validity of the debts, even if these same attorneys have been retained by the creditor to assess that validity.

As a result, when *Avila, supra* and *Jenkins, supra* are considered together, an attorney who sends debt collection letters must exercise legal judgment, but if the same attorney prepares and files a debt collection lawsuit, he or she may dispense altogether with legal judgment. Such a result is unintelligible. Under the Seventh Circuit's decision, an attorney must at one instant use his or her professional judgment concerning a debt, but at the next instant, he or she is somehow transformed into a debt collector and is no longer required to use that judgment, despite the fact that this same attorney continues to enjoy all the power and influence of his or her position with respect to the debtor. This ability to change hats from attorney to debt collector at will is exactly what Congress and this Court have labored to eliminate.

By way of explanation, the Seventh Circuit states that "[t]o require an attorney debt collector to conduct an independent investigation into the legal intricacies of the client's contract with the consumer would create a double standard for the bona fide error doctrine based upon the identity of the collector." *Jenkins*, 124 F.3d at 833-834. In his dissent to the Seventh Circuit's opinion, Judge Ripple criticized this result, stating:

> To hold that the FDCPA requires lawyers to meet the duties imposed upon them as attorneys does not discriminate against lawyers. It simply requires that lawyers use responsibly the special weapons that are entrusted to them. My colleagues portray the attorney/debt collector as a Janus-like entity who, in the course of collecting a single debt for his client, is sometimes attorney . . . and sometimes debt collector . . . . However, the Supreme Court has made it clear: He is a debt collector who, because of the special tools at his disposal, can violate the Act in especially potent ways.

Id. at 837-838.

Moreover, the bona fide error defense requires that a debt collector have in place procedures "reasonably adapted to avoid such error." 15 U.S.C. §1692k(c). Reasonable procedures for attorneys ought to differ from reasonable procedures for non-attorneys, because in most cases only attorneys have the power to institute lawsuits and bring the full force of legal process to bear upon debtors.

What is reasonable must depend on the facts of the particular situation. Congress indicated that it meant for courts to take into account the nature of the individual

debt collector's violation in 15 U.S.C. §1692k(b). It stated that "[i]n determining the amount of liability in any action under subsection (a), the court shall consider, among other relevant factors . . . *the nature of such noncompliance, and the extent to which such noncompliance was intentional*" (emphasis added). Congress clearly indicated that the severity of a violation is to be judged by considering all the attendant circumstances. If the fact that a debt collector is an attorney who is engaged in litigation against a debtor is relevant to the *level* of culpability she or he possesses, then that fact should also be considered when determining whether the attorney-debt collector has taken reasonable steps to *avoid* non-compliance.

There is nothing unusual about making such a distinction. The training and expertise of the actor are always considered in determining what action is "reasonable" under the circumstances. The specialist is held to a higher standard than the general practitioner.

Under the Seventh Circuit's approach to the bona fide error defense, attorneys who attempt to collect debts by suing debtors need not exercise "legal judgment" to determine whether there is any basis for the amounts sought, no matter how obvious the lack of legal basis. As a result, attorneys have regained the exemption that Congress and this Court attempted to eliminate. Attorneys can once again file suit against debtors and attempt to collect unauthorized amounts with impunity, as long as the attorneys do not ask questions and institute measures to catch "clerical" errors like mistyped numbers or faulty arithmetic.

Such a scenario occurred in the case at bar. Respondents are attorneys who collect debts for NBD Bank. Ms.

Jenkins has shown that *these same attorneys* also advise NBD Bank as to the validity of the debts owed to NBD. However, these attorneys have been permitted to profess complete ignorance as to the amounts added to Ms. Jenkins' alleged debt to NBD. The Seventh Circuit even concedes that a reasonable attorney in the position of respondents would have understood that there was a problem ("[i]f the FDCPA assigned liability for negligent behavior, Ms. Jenkins' case might survive," *Id.* at 831); the dissent concluded that a jury could find actual knowledge.

By holding that respondents were not required to exercise legal judgment, the Seventh Circuit provides a road map for attorneys to evade liability under the FDCPA. In *Strange*, *supra*, the court held that an attorney debt collector was liable under the FDCPA for attempting to collect attorney's fees when no contract or statute authorized such fees. It is basic law in Illinois (and virtually all other states) that "[o]nly when explicitly provided by statute or by agreement is a prevailing party entitled to his opponent's payment of his attorney fees." *Helland v. Helland*, 573 N.E.2d 357, 359 (Ill.App. 1991). Under the Seventh Circuit's decision, an attorney can now avoid liability by (i) having the client state that an amount is properly due, and (ii) not reading the contract or considering the basis for seeking the amount—*i.e.*, remaining wilfully blind.

Such an outcome is not merely offensive to common sense but directly contravenes the purposes of the FDCPA, which explicitly states that debt collectors may not collect any amount "unless such amount is expressly authorized by the agreement creating the debt or permitted by law." 15 U.S.C. §1692f(1).

The Seventh Circuit stated that Rule 11-type sanctions are sufficient to prevent the abuses at issue here, offering the observation that "[s]tate law sanctions (the equivalent of Fed.R.Civ.P. 11) apply to defendants in their capacity as lawyers." *Jenkins*, 124 F.3d at 834. However, when it repealed the attorney exemption to the FDCPA in 1986, Congress *expressly rejected* this argument, finding that "current law does not adequately protect consumers from attorney collection abuses." 99th Cong. 2nd Sess. (1985), *reprinted in* 1986 U.S.C.C.A.N. 1752, 1758.

The only decision to have endorsed such reasoning is *Green v. Hocking*, 9 F.3d 18 (6th Cir. 1993)—the case that created the conflict that led this Court to grant certiorari in the case at bar in 1994. The *Green* court stated that "we are unwilling to impose a system of strict liability [on attorneys] that conflicts with the current system of judicial regulation. We therefore hold that the actions of an attorney while conducting litigation are not covered by the FDCPA." *Id.* at 22. In its prior decision in this case, this Court rejected the argument that Rule 11 and similar provisions were sufficient, holding that attorneys conducting litigation were subject to the FDCPA.

Rule 11 sanctions are incapable of handling the problem of attorneys who file lawsuits for illegal debts. Most debt collection actions result in default judgments against unrepresented consumers who are unlikely to notice debt padding and are unlikely to know what to do about it if they do notice. In the rare cases in which consumers catch on, the collection attorney can simply withdraw the claim. Consumers are unlikely to know that Rule 11 or state sanctions exist and are even less likely to pursue them.

Debt padding for attorney debt collectors is essentially risk-free under the Seventh Circuit's decision, because the protection of the FDCPA does not apply. The Seventh Circuit has effectively reinstated the attorney exemption, using exactly the same argument that Congress and this Court have already rejected.

III.

CONGRESS DID NOT INTEND TO PERMIT DEBT COLLECTION ATTORNEYS TO INVOKE THE BONA FIDE ERROR DEFENSE FOR ERRORS OF LEGAL JUDGMENT.

The Seventh Circuit further held that the bona fide error defense in the FDCPA applies to *both* mistakes of law and simple clerical mistakes. *Jenkins*, 124 F.3d at 832 n. 7. By contrast, every other court has limited the bona fide error defense to clerical errors. *Baker*, 677 F.2d at 779 (Ninth Circuit held that evidence of mistake of law is insufficient to support bona fide error defense under the FDCPA, which allows only clerical mistakes to be defenses); *Pipiles*, 886 F.2d at 27 (Second Circuit held similarly); *Hulshizer*, 728 F.2d at 1038 (Eighth Circuit held similarly).[2]

The bona fide error defense in the Truth in Lending Act states:

> A creditor or assignee may not be held liable . . . if the creditor or assignee shows that the viola-

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[2] *Accord, Martinez v. Albuquerque Collection Servs.*, 867 F.Supp. 1495 (D.N.M. 1994); *Sibley v. Firstcollect, Inc.*, 913 F.Supp. 469 (M.D.La. 1995); *Bieber v. Associated Collection Servs.*, 631 F.Supp. 1410 (D.Kan. 1986).

> tion was not intentional and resulted from a bona fide error notwithstanding the maintenance of procedures reasonably adapted to avoid any such error.

15 U.S.C. §1640(c). This provision mirrors the FDCPA's bona fide error provision nearly *word for word*. From the outset, many courts (including the Seventh Circuit) interpreted the TILA provision to cover *only clerical errors*, not mistakes of law. *See, e.g., Haynes v. Logan Furniture Mart*, 503 F.2d 1161 (7th Cir. 1974); *Mirabal v. General Motors Acceptance Corp.*, 537 F.2d 871 (7th Cir. 1976); *Ives v. W. T. Grant Co.*, 522 F.2d 749 (2d Cir. 1975). Furthermore, they construed "intentional" to mean an intent to perform the acts that violated TILA, not an intent to violate TILA. *Haynes*, *supra* (procedures designed to avoid violations must include internal controls); *Smith v. No. 2 Galesburg Crown Fin. Corp.*, 615 F.2d 407 (7th Cir. 1980).

Congress *codified* this interpretation and resolved a split among circuits by adding a sentence to the end of TILA's bona fide error provision that read: "[e]xamples of bona fide error include, but are not limited to, clerical, calculation, computer malfunction and programming, and printing errors, except that an error of legal judgment with respect to a person's obligations under this title is not a bona fide error." 15 U.S.C. §1640(c). The FDCPA bona fide error provision does not contain this last sentence, because there had been no such litigation under the FDCPA bona fide error provision.

This addition to TILA's bona fide error provision merely codified the existing case law; in no way does it indicate that the TILA provision differs in scope or purpose

from the FDCPA provision, as the Seventh Circuit indicated. There is no reason to believe that Congress intended the FDCPA provision to be interpreted differently than the identical TILA provision. Congress merely affirmed this interpretation by adding an extra sentence to TILA. Far from denoting a vast *difference* between the two statutory provisions, this sequence of events serves only to strengthen their similarities. In short, there is no support for the Seventh Circuit's distinction between the TILA and the FDCPA bona fide error provisions in the legislative history or the case law.

It is undisputed that respondents had *no* procedures for reviewing the legal sufficiency of claims they made against consumers. As the Seventh Circuit recognized, "there is no evidence that defendants exercised any legal judgment . . . ." *Jenkins*, 124 F.3d at 832. Because the Seventh Circuit has taken a large step toward weakening the protection of the FDCPA based on ill-considered distinctions and has created conflicts among the circuits, the petitioner believes this Court should grant certiorari to resolve these issues and conflicts.

CONCLUSION

For all the reasons stated above, petitioner Darlene Jenkins respectfully requests that the Court issue a writ of certiorari to the United States Court of Appeals for the Seventh Circuit.

Respectfully submitted,

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